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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **SOUTHERN DIVISION**
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13 **HARRIS KHAN,**

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15 **Plaintiff,**

16 **v.**

17 **INFOR (US) INC, and CHRIS**
18 **MCDADE,**

19 **Defendants.**
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22

} **Case No.: SACV 16-00657-CJC(KESx)**

} **ORDER GRANTING PLAINTIFF'S**
} **MOTION TO REMAND**

23
24 **I. INTRODUCTION**
25

26 Plaintiff Harris Khan brings this action against Defendants Infor (US) Inc.
27 (“Infor”) and Chris McDade (“McDade”) for retaliation, California Labor Code
28 violations, wrongful termination in violation of public policy, and defamation. (*See* Dkt.

1 14 [“First Amended Compl.” (“FAC”)].) Two motions are before the Court: Khan’s
2 motion to remand and Infor’s motion to dismiss. (Dkt. 15; Dkt. 16.) For the following
3 reasons, Khan’s motion to remand is GRANTED, and Infor’s motion to dismiss is
4 DENIED WITHOUT PREJUDICE.¹

5 6 **II. BACKGROUND**

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8 According to the allegations of the FAC, Khan was hired by Infor’s predecessor, a
9 company called Lawson, in June 2011. (FAC ¶ 12.) Following Lawson’s acquisition by
10 Infor, Khan was promoted to “Vice President in charge of the Office of the Chief
11 Financial Officer.” (*Id.* ¶ 14.) Khan’s compensation—and, evidently, the compensation
12 of his subordinates—was based on both salary and commission, and accordingly, Khan’s
13 superiors would create “metrics” which he and his group would be required to meet in
14 order to participate in certain revenue sharing and commission plans. (*Id.* ¶ 15.) Khan’s
15 superiors would initially relate the metrics orally and then follow up with a written
16 compensation plan which, Khan says, would often not reflect the oral promises. (*Id.*
17 ¶ 16.)

18
19 Over time, Khan began to suspect that the discrepancies between the oral
20 commitments and written compensation plans were actually part of a process designed to
21 boost the company’s profits. Management, Khan says, would promise commissions and
22 then fail to pay them, artificially inflating Infor’s profits ahead of a public offering.
23 (FAC ¶¶ 18–20.) When confronted, management would insist that commissions were
24 discretionary and did not have to be paid at all. (*Id.* ¶ 20.)

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28 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
for July 18, 2016 at 1:30 p.m. is hereby vacated and off calendar.

1 Eventually, Khan went to Defendant McDade, Infor's Director of Finance, to
2 investigate how relevant metrics and quotas were being determined. (FAC ¶ 21.) Rather
3 than assist in Khan's investigation, McDade began to tell others that Khan was
4 "ineffective in his work" and that he was "consistently berating the Finance Department
5 with improper inquiries and questions related to compensation issues." (*Id.*) Khan says
6 that McDade's comments "expressly and impliedly stated that [he] was not performing
7 his job duties effectively" and that he was "a poor employee more concerned with
8 'rocking the boat'" than doing his job. (*Id.*) Khan also alleges that McDade's comments
9 were known to and encouraged by Infor's Vice President of Finance and Compensation,
10 Erica Bellavia. (*Id.* ¶ 22.)

11
12 Commission problems continued. Khan alleges that commissions were "reserved"
13 on Infor's financial statements but then never paid to the employees who earned them.
14 (FAC ¶ 23.) And multiple levels of management were aware of the discrepancies
15 between the commissions Infor said they were paying and the commissions they actually
16 paid. (*Id.* ¶ 24.) Khan continued to make "numerous complaints and inquiries" on behalf
17 of himself, his peers, and his subordinates, to no avail. (*Id.* ¶ 25.)

18
19 In June 2014, Khan was assigned a smaller role within Infor, and in November
20 2014, he received a new compensation plan, which he found unsatisfactory. (FAC ¶¶ 26–
21 28.) Khan complained about the plan to his superiors and requested that it be
22 recalculated as a "bookings plan." (*Id.* ¶ 28.) His superiors agreed that he merited a
23 different plan, but it was not until Khan "reached out to Human Resources to launch a
24 formal complaint" that the superiors produced a "bookings plan" for Khan. (*Id.* ¶ 29.)
25 Khan was forced to accept the plan without viewing it, and when he was made aware of
26 its terms, he found that they differed substantially from his expectations. (*Id.*)

1 Subsequently, Khan made a complaint on behalf of a co-worker, who Khan
2 believed had been shorted approximately \$267,000.00 in commissions. (*Id.* ¶ 34.) An
3 individual retained by Infor to investigate the matter contacted Khan and told him that
4 commission plans were not binding on Infor. (*Id.* ¶ 35.) Two days later, Khan was
5 terminated by Infor, purportedly because of a “restructuring.” (*Id.* ¶ 36.) He alleges that
6 his termination was actually retaliation for his consistent complaints about Infor’s
7 commission scheme, which he believes was illegally withholding wages from Infor’s
8 employees. He also alleges that McDade specifically retaliated against him by repeatedly
9 “denigrating and admonishing him,” often in front of his peers, to “stop questioning the
10 logic” of the metrics. (*Id.* ¶ 53.) McDade’s comments, Khan says, were relayed to his
11 superiors who terminated him. (*Id.* ¶ 54.)

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13 Based on these allegations, Khan filed a state court complaint in February 2016.
14 (Dkt. 1-1.) The original complaint alleged six employment-related causes of action
15 against Infor and a single cause of action for defamation against McDade. (*Id.*) Infor
16 removed to this Court in April, asserting diversity jurisdiction. (Dkt. 1.) Infor, a citizen
17 of Delaware and New York, acknowledged that McDade and Khan are both California
18 residents, but argued that McDade had been fraudulently joined, that Khan had wholly
19 failed to state a claim against her, and therefore that diversity jurisdiction actually
20 existed. (*See id.*)

21
22 McDade subsequently moved to dismiss the defamation claim against her. (Dkt.
23 10.) On May 9, 2016, the Court granted Infor’s motion. (*Id.*) It explained that Khan’s
24 complaint did not allege *any* defamatory statements within the applicable statute of
25 limitations, and added that the complaint did not adequately allege that a conditional
26 privilege did not apply. (*See* Dkt. 13 at 4–7.) These defects meant that Khan had wholly
27 failed to state a claim against McDade and that such failure was “obvious according to
28 the settled rules of the state.” (*Id.* at 7 (quoting *Hunter v. Philip Morris USA*, 582 F.3d

1 1039, 1043 (9th Cir. 2009).) Accordingly, the Court concluded, McDade had been
 2 fraudulently joined and grounds for removal actually existed.

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 4 The Court granted Khan leave to amend his complaint, and on May 31, 2016, Khan
 5 filed his FAC. The FAC asserts *two* claims against McDade: the claim for defamation,
 6 which Khan has now bolstered with some additional allegations, and a claim for
 7 retaliation under California Labor Code § 1102.5. (*See generally* FAC.) Khan then
 8 moved to remand, believing that diversity jurisdiction no longer exists. (Dkt. 16.) Infor
 9 again moved to dismiss the causes of action asserted against McDade. (Dkt. 15.)

11 **III. DISCUSSION**

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 13 Any civil action brought in a state court but over which a district court has
 14 diversity jurisdiction may be removed. 28 U.S.C. §§ 1332, 1441(a). The defendant
 15 removing the action to federal court bears the burden of establishing that the district court
 16 has subject matter jurisdiction over the action, and the removal statute is strictly
 17 construed against removal jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.
 18 1992) (“Federal jurisdiction must be rejected if there is any doubt as to the right of
 19 removal in the first instance.”). Diversity jurisdiction exists where the amount in
 20 controversy exceeds \$75,000 and complete diversity exists among the parties. 28 U.S.C.
 21 § 1332. “[O]ne exception to the requirement for complete diversity is where a non-
 22 diverse defendant has been fraudulently joined.” *Hunter*, 582 F.3d at 1043.

23
 24 “Joinder is fraudulent ‘if the plaintiff fails to state a cause of action against a
 25 resident defendant, and the failure is obvious according to the settled rules of the state.’”
 26 *Hunter*, 582 F.3d at 1043 (quoting *Hamilton Materials Inc. v. Dow Chem. Corp.*, 494
 27 F.3d 1203, 1206 (9th Cir. 2007)). Conversely, “if there is any possibility that the state
 28 law might impose liability on a resident defendant under the circumstances alleged in the

1 complaint, the federal court cannot find that joinder of the resident defendant was
 2 fraudulent, and remand is necessary.” *Id.* at 1044. In determining whether a defendant
 3 was fraudulently joined, all disputed questions of fact and all ambiguities in the
 4 controlling state law must be resolved in favor of the non-moving party. *Plute v.*
 5 *Roadway Package Sys., Inc.*, 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001). The
 6 defendant may present additional facts to show that the joinder is fraudulent. *McCabe v.*
 7 *Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). The removing party carries a
 8 heavy burden of persuasion, as there is a presumption against finding fraudulent joinder.
 9 *Id.*; see *Gaus*, 980 F.2d at 566. A defendant cannot successfully prove fraudulent joinder
 10 merely by arguing that a plaintiff has failed to state a claim. *Peters v. Emeritus Corp.*,
 11 CV 15-06137 SJO (SHx), 2015 WL 5436991, at *2 (C.D. Cal. Sept. 15, 2015). Instead,
 12 the defendant must show by “clear and convincing evidence” that it will be “effectively
 13 impossible” for the plaintiff to state a claim against the non-diverse defendant. *Munoz v.*
 14 *Lab. Corp. of Am.*, EDCV 15-902-GW (DTBx), 2015 WL 4507104, at *1 (C.D. Cal. July
 15 23, 2015).

16
 17 Here, Infor has not carried its heavy burden of demonstrating fraudulent joinder. It
 18 successfully did so on a previous motion to dismiss because Khan had not alleged *any*
 19 defamatory statements during the relevant statute of limitations period, and because the
 20 “statute of limitations defense is a permissible means by which to establish fraudulent
 21 joinder,” *Barabin v. AstenJohnson, Inc.*, No. C14-0557JLR, 2014 WL 2938457, at *2
 22 (W.D. Wash. June 30, 2014).² Here, by contrast, Khan fleshes out his defamation cause
 23 of action with additional allegations that prevent Infor from establishing fraudulent
 24 joinder. He alleges, for example, that McDade published defamatory statements
 25 regarding him and his work within Infor all the way through his termination on March 13,

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 28 ² The elements of a defamation claim are as follows: “(a) a publication that is (b) false, (c) defamatory,
 and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.” *Taus*
v. Loftus, 40 Cal. 4th 683, 720 (2007).

2015—in other words, into the relevant statute of limitations period. (FAC ¶ 84; *see also* Dkt. 13 (discussing one-year limitations period.) He also recounts a recent experience in which he was abruptly rejected for a position at another company after an Infor employee “became involved with the hiring process,” relating his belief that McDade continues to defame him and his work. (*Id.* ¶ 88.) Finally, Khan’s additional allegations regarding McDade’s comments, including that she called him a “troublemaker,” (*id.* ¶ 53), and that she “denigrat[ed]” and “admonish[ed]” him in front of his peers regarding his complaints about Infor’s metrics, (*id.*), sufficiently persuade the Court that it is not impossible for Khan to state a claim for defamation against McDade and overcome any California Civil Code § 47’s conditional privilege, which requires that otherwise privileged statements be made with malice. *See Peters*, 2015 WL 5436991, at **2–3 (finding no fraudulent joinder where the plaintiff alleged that defamatory statements were made to the plaintiff’s colleagues, demonstrating ill will); *O’Neill v. Grupo Radio Centro LA, LLC*, Case No. 2:15-cv-06116-SVW-JC, 2015 WL 6453073, at *4 (C.D. Cal. Oct. 21, 2015) (holding that a plaintiff’s allegations regarding a defendant’s “campaign of character assassination” by way of “demeaning remarks and defamatory statements” sufficiently stated a defamation claim that could defeat a defendant’s assertion of fraudulent joinder).

B. Retaliation

Khan also alleges that McDade retaliated against him in violation of California Labor Code § 1102.5. To establish liability under that section, a plaintiff must demonstrate that (1) he engaged in a protected activity, (2) his employer subjected him to an adverse employment action, and (3) there is a causal link between the two. *Patten v. Grant Joint Union High Sch. Dist.*, 134 Cal. App. 4th 1378, 1384 (2005). Khan’s FAC alleges that after he alerted Infor managers to what he believed was illegal wage withholding, McDade subjected him to denigration and insults about his job performance, following which he was terminated. He believes that Infor terminated him in retaliation

1 for his complaints, and that McDade's comments were crucial to Infor's decision to
2 terminate him.

3
4 As with Khan's defamation claim, Infor has not satisfactorily shown that Khan's
5 failure to allege retaliation on McDade's part is "obvious according to the settled rules"
6 of California, *Hunter*, 582 F.3d at 1043. First, the entire issue of individual liability
7 under § 1102.5 is currently unsettled. Section 1102.5 was "amended in 2013 to expand
8 liability from 'an employer' to include 'any person acting on behalf of the employer.'" *O'Neill*,
9 2015 WL 6453073, at *2; *see also* Cal. Labor Code § 1102.5. And a number of
10 courts in this circuit have recently granted motions to remand where a plaintiff has
11 alleged individual liability against a non-diverse defendant under § 1102.5. *O'Neill*,
12 2015 WL 6453073, at *3 ("Even if the amended statute in question ultimately does not
13 provide for individual liability, no California Court has currently addressed this issue.");
14 *De La Torre v. Progress Rail Servs. Corp.*, Case No. CV 15-4526 FMO (GJSx), 2015
15 WL 4607730, at *4 (C.D. Cal. July 31, 2015) (refusing to attempt to "divine" how
16 California courts will construe § 1102.5).

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18 To be sure, McDade does not say that individual liability can *never* inure under
19 § 1102.5. Instead, she says that Khan does not allege that McDade ever *knew* of any
20 protected activity. But this is a blinkered reading of the FAC, which alleges that McDade
21 complained that Plaintiff "was consistently berating the Finance Department with . . .
22 other compensation issues." (FAC ¶ 83.) And those issues included, Khan says, conduct
23 he believed to be illegal: the withholding of commissions from employees who had been
24 promised them. Similarly, although McDade insists that the alleged defamatory
25 comments do not constitute an "adverse employment action" for the purposes of
26 § 1102.5, it is beyond question that such actions can encompass any action that
27 "materially affect[s] the terms and conditions of employment," *Patten*, 134 Cal. App. 4th
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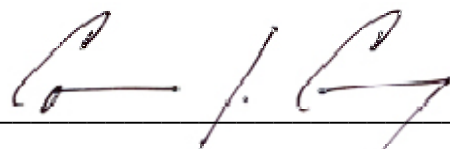
1 at 1387, and that termination qualifies. And, importantly, Khan alleges that McDade's
2 comments were crucial to his termination.

3
4 To be sure, Khan's retaliation allegations against McDade are not especially
5 robust. McDade was apparently not Khan's direct supervisor, and Khan seems not to be
6 aware of the magnitude of McDade's specific involvement in his termination.
7 Nonetheless, this is precisely the sort of issue on which a finding a fraudulent joinder
8 would be inappropriate. Khan has adequately alleged that McDade denigrated him and
9 his work over a long period of time, that her comments affected Infor's decision to
10 terminate him, and that the comments affected his work environment. Combined with
11 § 1102.5's relatively new provision for individual liability, the Court cannot say that
12 there is *no* possibility that Khan will be able to state a retaliation claim against McDade.
13 Remand is therefore appropriate.

14
15 **IV. CONCLUSION**

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17 For the foregoing reasons, the Court finds that McDade has not carried her heavy
18 burden of demonstrating that there is no possibility Khan can state a claim against her.
19 As she and Khan are not diverse, subject matter jurisdiction is lacking, and this action is
20 REMANDED to Orange County Superior Court. McDade's pending motion to dismiss is
21 DENIED WITHOUT PREJUDICE.

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25 DATED: July 13, 2016



CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE